

Nadler Examines Landmark Age Discrimination Case and Subsequent Legislation to Protect Older Workers

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WASHINGTON, D.C. - Today, Congressman Jerrold Nadler (D-NY), Chair of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, chaired a hearing on H.R. 3721, the Protecting Older Workers Against Discrimination Act. The Subcommittee explored whether older employees are afforded sufficient protections from age discrimination in the workplace since the 2009 U.S. Supreme Court decision in *Gross v. FBL Financial Services, Inc.*

"The Supreme Court's decision in *Gross v. FBL Financial Services, Inc.* was characterized by Justice Stevens as 'an unabashed display of judicial lawmaking,'" said Nadler. "Left standing, the *Gross* decision provides less protection and makes it harder for older workers to prove unlawful age discrimination. H.R. 3721 seeks to restore the pre-*Gross* standard for proving age discrimination and the longstanding presumption that the framework and precedent of Title VII of the Civil Rights Act apply to other federal discrimination and retaliation laws. We should act promptly to correct the *Gross* decision before more damage is done."

On June 18, 2009, in a 5-4 decision, the Supreme Court ruled in *Gross v. FBL Financial Services, Inc.* that a plaintiff cannot bring a mixed-motive claim under the Age Discrimination in Employment Act, a law which is intended to protect older employees from age discrimination in the workplace. Mixed-motive claims require an employer to show that it acted lawfully once an employee has shown that the employer considered both unlawful and legitimate factors in making an employment decision, such as firing or demoting an older employee. This recent decision means that the burden of proof never shifts to the employer, even if it admits that it considered an employee's age in reaching a decision. In addition to establishing a new, higher burden for older workers, the decision has opened the door to imposing a similarly difficult standard on other victims of employment discrimination.

Witnesses at the hearing were: Jack Gross, plaintiff in *Gross v. FBL Financial Services, Inc.*; Jocelyn Samuels, Senior Counselor, Civil Rights Division, U.S. Department of Justice; Eric Dreiband, Partner, Jones Day, Washington, D.C.; and, Helen Norton, Professor, University of Colorado Law School, Boulder, Colorado.

The following is Nadler's opening statement, as prepared:

"Good Morning. I will now call the Subcommittee to order. Today we examine H.R. 3721, the Protecting Older Workers Against Discrimination Act.

"H.R. 3721 corrects the Supreme Court's decision in *Gross v. FBL Financial Services*, where - by a slim 5-4 majority - the Court made it harder for older workers to prove unlawful age discrimination by holding that 'mixed motive' claims are no longer available under the Age Discrimination in Employment Act, or ADEA.

"In a 'mixed motive' claim an employer is alleged to have acted for a mixture of lawful and unlawful reasons, and the burden shifts to the employer to prove that it acted lawfully once an employee proves that a protected characteristic was a motivating factor in an employment decision.

"After the Court's decision in *Gross*, however, the burden of proof never shifts to the employer in a case under the ADEA, even if the employer admits that age was a factor in its decision. Instead, older workers always bear the burden of proving that age was the 'but for' or determinative factor for a challenged employment decision, and - therefore - must always prove that the employer would not have made the same decision if age had not been a factor.

"This new and higher standard for victims of age discrimination departs from decades of precedent and from the statutory framework of Title VII, which allows for 'mixed motive' claims and previously had served as the model for proving discrimination under the ADEA as well as other federal discrimination and retaliation laws.

"Title VII, like the ADEA, prohibits discrimination 'because of' certain protected characteristics. The Supreme Court, in *Price Waterhouse v. Hopkins*, interpreted this language to prohibit discrimination motivated - in whole or in part - by a protected characteristic and recognized mixed-motive claims under Title VII. Congress approved and codified mixed-motive claims in the Civil Rights Act of 1991, and expressed its intent that the ADEA and other federal laws should continue to be interpreted consistently with Title VII as amended by the '91 Act.

"The 5-justice majority in *Gross* ignored this unambiguous history, choosing instead to adopt an interpretation previously rejected by the Court and by Congress. As a result, the exact same words - 'because of' - now mean something different under the ADEA than they do under Title VII.

"But the damage does not end there. In reaching this result, the majority directed the lower courts to engage in a 'careful and critical' examination before applying Title VII's precedent and framework to any other federal law, thus declaring open season on settled precedent. The lower courts have taken up this task, and have applied *Gross* in a variety of contexts, including to claims of discrimination because of disability, jury service, and the exercise of free speech rights.

"Coming from a Court whose Chief Justice voted with the 5-member majority in *Gross* but who believes that judges are like umpires - that their role is to call balls and strikes and not to pitch or bat - the *Gross* decision was quite a curve ball. Not only did the majority reject decades of settled precedent and the longstanding presumption - consistently endorsed and relied upon by Congress when drafting legislation - that Title VII should serve as a model for other federal laws, it did so only by raising and resolving a different issue than the one presented to the Court, a question that was not briefed or argued by the parties or amici.

"Writing in dissent, Justice Stevens described the majority's conduct as 'an unabashed display of judicial lawmaking.' For Jack Gross - who is here with us today - the experience has shattered his trust in the judicial system.

"We can, and should, correct this. Left standing, the *Gross* decision provides less protection and makes it harder for older workers to prove unlawful age discrimination. It also creates substantially different standards across and between federal civil rights laws, thus undermining their predictability, scope and effectiveness.

"The decision also makes Congress's task in drafting legislation impossible by endorsing the ridiculous notion that the same language - here the words 'because of' or 'on the basis of,' which have been used by Congress in countless federal discrimination and retaliation laws to require a causal connection between a protected characteristic and an employment decision - can mean different things.

"H.R. 3721 rejects this reasoning. It seeks to restore the pre-*Gross* standard for proving age discrimination and the longstanding presumption that Title VII's framework and precedent applies to other federal discrimination and retaliation laws.

"We should act promptly to correct the *Gross* decision before more damage is done, and I look forward to hearing

more about this from our witnesses today."